IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-319

AVIS RENT A CAR SYSTEM, INC. AND CHRYSLER LEASING CORPORATION,

Petitioners,

vs.

CITY OF CHICAGO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITIONERS' REPLY MEMORANDUM.

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Respondent's Brief in Opposition attempts to obscure the issue presented. The issue in this case is whether vicarious, criminal or "quasi-criminal" liability may be imposed under an ordinance which, as construed, precludes proof of the defense that the car rental companies did not have a "responsible relation" to the offense; that they were powerless to prevent or correct the violation; and that imposition of the penalty upon them does not and cannot serve a regulatory purpose, but is solely a revenue-collecting device.

The decision below, like decisions in other states relating to identical or similar ordinances (Avis Petition, p. 5), we submit, is in conflict with the holdings of this Court. This Court has

repeatedly held that the enumerated factors are essential to the imposition of vicarious liability and that they may "be raised defensively at a trial on the merits."[1]

These requirements were reiterated in no uncertain terms in Chief Justice Burger's opinion for the Court in *United States* v. *Park, supra.* Applying the principles of *Dotterweich, supra,* the Court stated:

> "The duty imposed by Congress on responsible corporate agents is, we emphasize, one that requires the highest standard of foresight and vigilance, but the Act, in its criminal aspect, *does not require that which is objectively impossible.* The theory upon which responsible corporate agents are held criminally accountable for 'causing' violations of the Act permits a claim that a defendant was 'powerless' to prevent or correct the violation to *'be raised defensively at a trial on the merits'.* . . . If such a claim is made, the defendant has the burden of coming forward with evidence, but this does not alter the Government's ultimate burden of *proving beyond a reasonable doubt* the defendant's guilt, *including his power,* in light of the duty imposed by the Act, *to prevent or correct the prohibited condition.*" (421 U. S. at 673) (Emphasis added.)

Respondent seeks to avoid the effect of *Park* by reliance on this Court's earlier decision in *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U. S. 663 (1974). *Calero,* however, was a forfeiture case in which, as Mr. Justice Brennan's opinion makes clear, the regulatory purpose served is manifest and indisputable: (1) the forfeited article was entrusted to the malefactor in a personal transaction where the owner had opportunity to inquire as to the character of the bailee and the use to which the vehicle was to be put; and (2) forfeiture of the vehicle served the obvious purpose of preventing its repeated use as an instrument for the prohibited activity.

1. See *United States* v. *Park,* 421 U. S. 658, 673 (1975); *United States* v. *United States Gypsum Company,* 46 U. S. L. W. 4937 (U. S. June 29, 1978); *Morissette* v. *United States,* 342 U. S. 246 (1952); *United States* v. *Dotterweich,* 320 U. S. 277 (1943).

Mr. Justice Brennan's opinion in *Calero* expressly recognizes that "it would be difficult to reject the constitutional claim . . . of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." (416 U. S. at 689-690).

It is precisely that principle which is presented by the present case in which the thrust of the decision below is that a penalty may be imposed without allowing proof of the facts that (1) as is evident to anyone who has ever rented a car, there is nothing whatever that the car rental company can do to withhold a car from persons who may park overtime, and (2) collection of fines from car rental companies—involving aggregate penalties of millions of dollars[2]—cannot possibly serve to discourage violations of parking regulations.

The City would escape the fatal consequence of this constitutional requirement by the astounding assertion that it is immaterial, because petitioners never "offered any proof at trial" to establish the defense. (Br. in Opp., p. 10.) Of course petitioners have never offered proof at trial. The reason is simple: There has been no trial. The case was decided by the trial court on the pleadings. It was decided in favor of petitioners. The trial court dismissed Count I of the Complaint, which sought to recover fines, and granted a declaratory judgment in petitioners' favor on Count II, ruling that car rental companies are not liable merely as owners. This ruling was reversed by the Illinois Supreme Court which ruled, as a matter of substantive law, that petitioners never will have the opportunity to prove by evidence that they are powerless to prevent the violations and that no regulatory purpose is served by imposing a penalty upon

2. Respondent refers to the "two million dollar fine" defendants may suffer (Br. in Opp., p. 9). Actually, the penalties will be much greater.

them. Its ruling holds that only two possible defenses are available—that the violation did not occur, or that the defendant was not the owner of the vehicle.

The facts which this Court's decisions make indispensable to the constitutionality of the ordinance are, therefore, by the decision of the Supreme Court of Illinois, made irrelevant.

At a minimum, therefore, review by this Court is required in order to enforce the fundamental constitutional principle of vicarious criminal liability mandated by this Court's decisions, by affording petitioner an opportunity to prove the defenses to which they are constitutionally entitled. The state court cannot constitutionally dispense with proof of the "responsible relation" and regulatory purpose essential to the validity of a conviction under the ordinance.

Respondent makes no argument directed to the situation of one of petitioners, Chrysler Leasing Corporation. (See Avis Petition, p. 15.) None of respondent's arguments as to the relationship between the owner and the person committing the violation has the slightest application to Chrysler Leasing. Chrysler leases fleets of vehicles to car rental companies. It has nothing to do with the subsequent rental of cars to the operators who commit the violations. Not only does it have no "responsible" relation to the offense—it has no relationship whatever. Nothing could be clearer than that holding Chrysler personally liable can have no regulatory purpose or effect. For this reason alone the application of the ordinance sanctioned by the decision below violates the constitutional principles enunciated by this Court.

But even as to the other petitioners it is nonsense to assert, as the respondent states, that the car rental company "knows" the persons to whom the vehicles are rented in any sense in which "knowledge" is relevant here. The thousands of necessarily speedy, impersonal transactions in which a car rental company engages daily—transactions necessarily consummated in a few

moments' time[3]—are vastly different from the case of an individual lending his car to a friend or relative, as well as from the leasing of a pleasure yacht, involved in *Calero-Toledo, supra,* which obviously affords a realistic and practical opportunity and occasion for inquiry as to the character and purposes of the lessee. As the concurring opinion in that case emphasized, "The lessee of the vessel was, of course, no stranger." (Concurring opinion of White, J., 416 U. S. at 692.) The car rental company, on the other hand, cannot possibly know or consider the likelihood that the operator will violate the law. To insist on some standard of "care" addressed to that likelihood would be simply to require "that which is objectively impossible." (*United States* v. *Park, supra* at 421 U. S. 673).

Respondent's other speculations as to how car rental companies could deter the commission of parking violations are equally far-fetched. This Court is invited to sustain the ordinance on the ground that car rental companies could engage in a nationwide blacklist of all car renters as to whom a notice of parking violation has been received by any company—and this without even the entry of a judgment against the individual who is asserted to have committed a violation. The impracticality—not to mention the probable illegality—of such a method of conducting the car rental business hardly requires comment. Equally impractical is the suggestion that the car rental companies can simply pay the fine and "bill" the operator of the car or require a "cash deposit." The car rental company has no notice of an alleged parking violation until long after the renter has turned in the vehicle, settled his bill, and departed. In Chicago, the car rental company receives no notice of the alleged violation until almost two months after the event. The possibiiity that the car renter will reimburse the company is remote—and in any event, neither he nor the company will have had an opportunity to contest the frequently erroneous charge of law violation. (See Avis Petition, p. 9.)

3. Cf., the television ads featuring a well-known football hero and emphasizing the rapidity of the rental transaction, upon which the success of the car rental service is based.

There is no basis in this case for a rational belief that the ordinance as applied to car rental companies has or can have any conceivable regulatory effect. The constitutional requirement is that even more than a rational belief must exist; *Park* indicates that to impose vicarious criminal liability it must be proved beyond a reasonable doubt that the defendant had the power to prevent the violation. (*United States* v. *Park, supra* at 421 U. S. 673.) Since car rental companies have no such power, the obvious effect of the ordinance is precisely the opposite of a "regulatory effect;" its only effect is to advise operators of rented vehicles that they can violate the parking laws with impunity, thereby increasing rather than reducing violations.

As respondent's brief makes entirely clear (Br. in Opp., pp. 6-8), the true objective of the ordinance is simply to make it convenient for the City to add to its revenues by collecting parking fines, and to do so without the necessity of even proving that the violations actually occurred (since it is obvious that the car rental company is in no position to contest the alleged violation).[4]

The decisions of this Court permit no such justification for the infliction of penalties upon innocent persons who have no means of preventing the offenses at which the penalties are aimed. The ordinance, as construed by the Illinois Supreme Court, falls outside the "limited circumstances" (*United States* v. *United States Gypsum Co., supra* at 46 U. S. L. W. 4941) in which strict criminal liability is permitted. Certiorari should be granted in order to prevent the erosion of this fundamental constitutional principle by municipalities seeking convenient means of using the penal process to raise revenues.

4. Although the fines involved represent large sums of money, and obviously constitute an attractive source of revenue to the City, respondent's brief completely obscures the issue by implying that "there would be virtually no convictions for parking violations among the one million violations observed each year" (Br. in Opp., p. 8) unless the principle of liability asserted in this case is sustained. The fact is that these are *not* convictions of violators for parking violations. The issue in this case is not whether the City may proceed against violators of the parking laws, or even whether it may impose vicarious liability on individual owners who lend their cars and may stand in a "responsible relation" to the offense. The only issue is whether absolute vicarious liability may be imposed on car rental companies.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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